Buchanan Marine, L.P. Petitioner *and* Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO. Case 29–UC–000570

December 2, 2015

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has carefully considered the Employer's Request for Review of the Regional Director's June 2, 2010, Decision and Order, in which he found that the Employer's tugboat captains are not supervisors within the meaning of Section 2(11) of the Act. The Petitioner filed an opposition. The Request for Review is denied as it fails to raise any substantial issues warranting review.[1]

I.

The Employer contends that the Board has typically found tugboat captains to possess the authority to responsibly direct employees, and it cites *American River Transportation Co.*, 347 NLRB 925 (2006), among other cases, to support its view that the Board has generally found tugboat pilots and captains to be supervisors. It contends that the Regional Director erred by relying on *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and that cases from outside the maritime industry have no bearing here. We disagree.

In *Brusco Tug & Barge, Inc.*, 362 NLRB No. 28 (2015), incorporating by reference 359 NLRB No. 43 (2013), we found that the employer's mates were not statutory supervisors. In doing so, we noted that several pre-*Oakwood* cases found tugboat mates to be supervisors, but in those cases, the Board did not include any analysis of accountability under our current standard. We thus found those cases "to be of limited precedential value." 359 NLRB No. 43, slip op. at 9. Here, the Regional Director correctly relied on the *Oakwood* standard, and the Employer's contention that the Regional Director should have relied on pre-*Oakwood* cases does not present any issues warranting review.

II.

The Regional Director found that captains direct the crew by deciding specific tasks to be undertaken in connection with navigating the tugboat and when setting up a tow. Although those decisions involve the captains' exercise of independent judgment, the Regional Director found that the Employer has not established that it holds captains accountable for the crew members' performance *of their own duties*, i.e., that the direction is "responsible," as the statutory definition of "supervisor" requires. The Employer requests review of this finding, and cites *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002), which was cited favorably in *Oakwood*, and *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997), in support of its contention that tugboat captains are accountable for their direction of crew. It also points to several instances where its Safety Management System imposes consequences on captains for deckhands' performance. We address each of these contentions in turn.

In *Brusco Tug*, as discussed above, the Board found *American Commercial Barge Line* "to be of limited precedential value." 359 NLRB No. 43, slip op. at 9. The Employer and our dissenting colleague contend that the Board cited *American Commercial Barge* in *Oakwood* for the proposition that some pre-*Oakwood* cases required a showing of accountability, and therefore that *American Commercial Barge*'s definition of accountability is sufficient to meet our current test. But in *American Commercial Barge*, the Board neither defined accountability nor held that a showing of accountability was required to prove responsible direction. The Board's treatment of the issue in that case was limited to one conclusory statement, with no supporting explanation or examples: "If a crew member does something wrong during the pilot's watch, such as causing the tow to break loose, the pilot is held responsible." 337 NLRB at 1071. We do not disagree with the proposition that captains are accountable under *Oakwood* if their employers hold them responsible when a deckhand under their direction causes a tow to break loose. But the employer bears the burden of showing that the captains are held accountable for the errors of their crew members, rather than simply stating that they are. Here, the Employer has not provided evidence showing how or for what captains are held accountable, including any showing of an adverse consequence that would befall a captain for a deckhand's poor performance.

Similarly, we find *Spentonbush* to be of limited precedential value. In *Spentonbush*, the United States Court of

[1] In its Request for Review, the Employer contends that the Regional Director erred in finding that captains were not accountable for their direction of other crew, and that the Regional Director erred in finding that captains lack authority to hire deckhands. For the reasons the Regional Director states, we deny review of the Regional Director's finding that captains lack authority to hire other employees, and confine our analysis below to captains' accountability for their direction of others.

Appeals for the Second Circuit listed several provisions of maritime law, and stated that the tugboat captain could be held accountable through loss of his license for a deckhand's failure to follow those provisions. 106 F.3d at 490–491. In *Brusco Tug*, however, the Board found that questions of supervisory status under Section 2(11) of the Act "cannot be answered merely by the assertion of maritime law." 359 NLRB No 43, slip op. at 8. As the Board explained in that case, "the two statutory schemes serve separate purposes," and the existence of authority that derives from the "privileges and obligations of maritime law . . . doesn't answer the questions posed by the 2(11) indicia of supervisory status." Id.; accord *McAllister Bros.*, 278 NLRB 601, 614 (1986) (captains' legal "responsibility" under Coast Guard regulations "does not confer supervisory status under the Act" because the captains do not exercise supervisory authority in the interests of the employer), enfd. 819 F.2d 439 (4th Cir. 1987). In any event, Edward Grzybowski, the Employer's vessel compliance and safety manager, testified that only under "some stipulations" of the U.S. Code could a captain lose his license for a deckhand's actions, apparently indicating his belief that it is unlikely that a captain would lose his license for a deckhand's error, even if the law technically allows for it. And even assuming that the Coast Guard would hold a captain accountable for violating maritime law in that circumstance, it does not follow that the Employer also would, and supervisory authority must be exercised "in the interest of the employer" under Section 2(11). *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 3 (2015). Accordingly, we find that the Employer has failed to establish accountability by its mere assertion of maritime law in the absence of specific evidence showing that *the Employer* holds its captains accountable for a deckhand's failure to follow that law.[2]

The dissent proposes adoption of a new test for supervisory status based on the "practical realities of running a business," specifically, (1) the nature of the employer's operations; (2) the work performed by undisputed statutory employees; and (3) whether it is plausible to conclude that all supervisory authority is vested in persons other than the putative supervisors. Applying this proposed standard to the instant case, the dissent contends that because "[t]ugboats do not operate themselves," it is "self-evident that someone—namely, the captain—possesses the authority to exercise at least some of the functions specified in Section 2(11)."

Contrary to the dissent, however, the question before us is not whether the tugboat is at large on the high seas without any person aboard whose commands must be obeyed. Obviously, the captain is such a person. But that does not answer the question posed by the Act. The sole question the Board must answer when making a supervisory determination is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11). Thus, we rely upon the text of the Act—specifically, the 12 enumerated types of 2(11) authority—and not other considerations, such as whether it is plausible to conclude that supervisory authority is vested in another individual. As the Third Circuit has observed, "[t]o do otherwise would be to usurp Congress's authority to promulgate the law." *NLRB* v. *Attleboro Associates, Ltd.*, 176 F.3d 154, 163 fn. 3 (3d Cir. 1999).

In any event, nothing in the statutory definition of "**supervisor**" implies that service as the **highest ranking** employee on site requires finding that the employee must be a statutory **supervisor**. See *Training School at Vineland*, 332 NLRB 1412, 1412 (2000). Likewise, if an individual "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it." *VIP Health Services, Inc. v. NLRB*, 164 F.3d 644, 649–650 (D.C. Cir. 1999). And a finding that captains are not supervisors for purposes of the Act does not mean that their commands need not be obeyed by the crew, or that the Employer may not discipline crew members for failing to obey them; it simply means that the captains may vote whether to be represented for purposes of collective bargaining, and be represented as part of a unit that selects a representative. As stated above, we agree with the Regional Director's finding that the Employer has not presented sufficient evidence to establish that its captains possess any of the indicia set forth in Section 2(11).[3]

Likewise, we find that the provisions of the Employer's Safety Management System (SMS) provide no support for the claim that the Employer holds the captains

[2] The dissent errs in contending that the Board in *Brusco Tug* "implicitly" adopted *Spentonbush*'s definition of accountability by distinguishing that case" rather than disagreeing with it. See *Brusco Tug*, 359 NLRB No 43, slip op. at 8. Thus, there is no "departure from precedent" to be explained.

[3] Based on this finding, the dissent argues that we are thereby "conclud[ing] that the Employer's Vice President for Marine Transportation, Jerry Weldon, *who is not even present* on any of its tugboats, nonetheless discharges all Section 2(11) functions" (emphasis in original). We conclude nothing of the sort. The issue of Weldon's supervisory status is not before us. Nor do we assess the supervisory status of tugboat captains categorically, as the dissent appears to do. The issue we decide today is the only one before us: whether *the Employer's captains* possess any of the indicia of supervisory status set forth in Sec. 2(11).

accountable. Those provisions give detailed instructions, including standard operating procedures, for the operation of the vessel. While they refer to the captain's potential loss of license for failing to ensure compliance with directives, none of those provisions states that the captain will suffer any specific adverse consequence to his employment if a mate or deckhand does not follow the required procedure. Instead, the SMS provisions contain the same broad statements that captains are "held accountable" that the Board has typically found insufficient to establish accountability.[4] We therefore find that the Employer has failed to raise any substantial issues warranting review.[5] Accordingly, we deny the Request for Review.

Dated, Washington, D.C. December 2, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that a tugboat captain who operates a vessel staffed by a six-employee crew is not a supervisor. I disagree with the majority's finding that the captain is not accountable for the direction of the crew. As to this issue, I believe my colleagues perpetuate what the Supreme Court called the Board's "running struggle to limit the impact of 'responsibly to direct' on the number of employees qualifying for supervisory status."[1] In my view, the majority fails to give appropriate consideration to captains' role as the officer in charge of everything that happens on board their vessels. I respectfully dissent because the majority's analysis is contrary to the Act and its legislative history, our case law, court of appeals precedent, and uncontroverted record evidence. Also, I believe the Board must evaluate three factors, in every case, when deciding whether or not particular individuals possess one or more of the indicia of supervisory authority set forth in Section 2(11) of the Act.

A. The Act confers supervisory status on a broad range of employees, and the majority's conclusion that the Employer's tugboat captains are not supervisors fails the test of common sense.

When initially enacted, the Wagner Act contained no mention of supervisors. The Act's definition of "employer," however, included "any person acting in the interest of an employer directly or indirectly."[2] The Board's early jurisprudence reveals ongoing grappling with the issue of how to include supervisors within the Act's protections even though supervisors "act[] in the interest of an employer." For example, in *Maryland Drydock Co.*,[3] the Board found that supervisors did not constitute an appropriate bargaining unit even if they were "employees" within the meaning of the Act. In *Soss Manufacturing Co.*, the Board concluded that "supervisory status does not by its own force remove an employee from the protection of Section 8 (1) and (3)."[4] The Board later overruled *Maryland Drydock* and found that a bargaining unit consisting of minor supervisors such as foremen constituted an appropriate bargaining unit.[5] Member Reilly dissented from that finding, stating that it did "irreparable damage to the delicate balance between the conflicting interests of management and worker which the National Labor Relations Act sought to bring about in American industry."[6] Over a strong dissent, the Supreme Court affirmed the Board's certification of the foremen's representative, finding that nothing in the Act excluded supervisors from its protection.[7]

Congress disagreed. In 1947, Congress passed the Taft-Hartley Act, containing the modern Section 2(11), which defines who is a "supervisor." It intended Section 2(11) to broadly apply to "individuals generally regarded as foremen and persons of like or higher rank."[8] The language of Section 2(11) gives effect to this intent, and the Supreme Court has noted that the "NLRA's unique purpose" means that the Act may "define 'supervisor'

[4] The dissent contends that captains dictate when mates may leave port in inclement weather, and that a captain could lose a bonus payment under the Employer's incentive bonus program should a mate fail to leave port on time. Contrary to the dissent, however, we do not find that this evidence proves that captains are accountable as the Board defines that term, because it does not show that the captain's accountability for a late-arriving vessel is based on the failings of the mate as opposed to the captain's own failure.

[5] The dissent would also find that the Employer's captains are statutory supervisors by virtue of their authority to assign, fire, and adjust grievances. We do not reach those issues because the Employer did not raise them in its Request for Review.

[1] *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 719 (2001).

[2] *Packard Motor Car Co.*, 61 NLRB 4, 5 (1945), enfd. 157 F.2d 80 (6th Cir. 1946), affd. 330 U.S. 485 (1947).

[3] 49 NLRB 733 (1943).

[4] 56 NLRB 348, 353 (1944).

[5] *Packard Motor Car*, 61 NLRB at 26.

[6] Id. at 27.

[7] *NLRB v. Packard Motor Car*, 330 U.S. 485 (1947).

[8] House Conf. Rep. 510 on H.R. 3020, as reprinted in National Labor Relations Board, 1 *Legislative History of the Labor-Management Relations Act* 539 (1948).

more broadly" than the law defines that term in other contexts.[9]

The Act draws a distinction between employees and supervisors that is central to the functioning of the collective-bargaining process. As described above, Congress rebuffed the Board's first attempt to erode this distinction, and the Supreme Court has continually rejected subsequent attempts.[10] In enacting this distinction, "Congress was intent on protecting the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies."[11]

Obviously, the Board must give effect to Congress's intent, including its intent to exclude supervisors from the Act's coverage. In this regard, several considerations warrant emphasis.

First, Section 2(11) sets forth 12 distinct indicia of supervisory authority, possession of any *one* of which is sufficient to make its possessor a supervisor. Section 2(11) states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to *hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward*, or *discipline* other employees, or *responsibly to direct them*, or to *adjust their grievances*, or *effectively to recommend such action*, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[12]

Even if an individual has no direct authority to take any of the 12 actions enumerated in Section 2(11), he or she is still a supervisor under that provision if he or she possesses the authority to "effectively . . . recommend" any one of the 12 actions.

Second, Congress adopted Section 2(11) to give the term "supervisor" a broader meaning than what had previously been reflected in Board decisions. Before Section 2(11)'s exclusion of supervisors from the Act's coverage was enacted in 1947, there was no exclusion of "supervisors" from the Act, but the Board previously differentiated between supervisors and nonsupervisors to prevent them from being placed in the same bargaining unit.[13] Board cases decided prior to 1947 held that individuals were supervisors only if they had authority to "'direct the work of [other] employees . . . *and* [had] authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees.'" *Kentucky River*, 532 U.S. at 718 (emphasis in original) (quoting *Douglas Aircraft Co.,* 50 NLRB 784, 787 (1943)). When Congress enacted Section 2(11)'s "supervisor" exclusion in 1947, it removed the word "and" from the Board's definition and substituted the word "or," which meant an individual would be a supervisor merely by directing the work of other employees *without* any other aspects of supervisory authority. Id. at 719 ("Whereas the Board required a supervisor to direct the work of other employees *and* perform another listed function, the Act permitted direction alone to suffice."). Congress also expanded the enumerated types of authority that confer supervisor status. The Board's subsequent efforts to narrowly interpret Section 2(11) have drawn significant rebukes from the Supreme Court.[14]

Third, I believe the Board's analysis of supervisory status has become increasingly abstract and out of touch with the practical realities of running a business. Consistent with the Board's responsibility to apply "the general provisions of the Act to the complexities of industrial life,"[15] I believe the Board must recognize that many businesses cannot function, as a practical matter, without having someone—or some reasonable number of people—exercising supervisory authority at a particular facility, during a particular shift, or in relation to a

[9] *Vance v. Ball State University*, 570 U.S. __, 133 S.Ct. 2434, 2445 fn. 7 (2013).

[10] See *Kentucky River*, above (rejecting the Board's holding that exercise of professional judgment does not constitute independent judgment within the meaning of Sec. 2(11)); *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (rejecting the Board's holding that professional employees exercising professional judgment do not act "in the interest of the employer" within the meaning of Sec. 2(11)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (recognizing broad "managerial exception" to the Act's definition of employee); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (finding university professors may fall within the "managerial exception" to the Act's definition of employee).

[11] *NLRB v. Packard Motor Car*, 330 U.S. at 499 (Douglas, J., dissenting).

[12] Sec. 2(11) (emphasis added).

[13] See *NLRB v. Kentucky River Community Care*, 532 U.S. at 718–719.

[14] For example, in *Kentucky River*, 532 U.S. at 711–712, the Supreme Court upheld the Board's practice of placing the burden of proving supervisor status on the party asserting it, but the Court rejected the Board's position that exercising "ordinary professional or technical judgment in directing less-skilled employees to deliver services" does not qualify as "independent judgment." Id. at 714 (citation omitted). Earlier, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. at 574, the Supreme Court rejected the Board's position that "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients" does not satisfy the Sec. 2(11) requirement of exercising supervisory authority "in the interest of the employer." The Court held that the Board's interpretation was "inconsistent with both the statutory language and this Court's precedents." Id. at 580.

[15] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963) (citation omitted). See also *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

particular function. Therefore, when evaluating supervisor status under Section 2(11), I believe the Board in every case should take into account (i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.[16] In other words, the "complexities of industrial life" include the reality that many businesses cannot operate, and many business activities cannot be performed, unless one or more individuals exercise supervisory authority for a particular facility, shift or function.[17]

The present case provides a classic example. The Employer's business involves tugboats "that operate 24 hours a day for up to seven days," with one captain "designated as the master of the vessel."[18] In addition to the captain, each tugboat is typically also staffed by a mate, an engineer, three deckhands, and sometimes trainees.[19] These tugboats operate in all types of weather, they are subject to extensive Coast Guard regulations, and their operation involves the assembly of barges for towing and requires interaction with other ship traffic.[20] Entire watches may be devoted to navigation, and other contingencies may arise, such as medical emergencies.[21]

Tugboats do not operate themselves. The Regional Director's Decision and Order provides the following description of the duties and responsibilities of captains in the Employer's tugboat operations:

> General, personnel, equipment, operational and administrative responsibilities of captains are set forth in the Employer's Safety Management System Manual. For example, the captain is required to ensure that all company policies, rules, regulations and all laws are followed by personnel under his supervision (i.e., the mate, engineer, deck hands, and any trainees). The captain is required to report all violations of the Employer's policy or violations of law. The captain is responsible to make sure that specific requirements are carried out by the crew. The captain is responsible to ensure that the vessel has a full crew when operating. If there is not a full crew, the captain has the authority to cease operations until a full crew is obtained. In this regard, according to the testimony of Captain/Mate Thomas Cutten, if someone becomes ill on the ship and needs medical attention, the captain advises the Coast Guard and dispatch. The Employer would then make arrangements for the person to get to a dock or to a medical facility. If the sick crew member does not need transport to a medical facility but is too ill to perform his duties, the captain calls dispatch and the Tug Personnel Manager arranges for a replacement crew member. The vessel cannot operate without a full crew complement. The captain must post a station bill and ensure that all crewmembers are familiar with their respective stations and duties in case of an emergency.
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> The captain's responsibilities also include directing the crew while organizing the tow line, monitoring ship traffic and safely navigating the boat. The captain can spend one or two hours to assemble the barges, closely interacting with the crew at this time. At times, an entire watch may be spent navigating the ship. Weather, the number of barges being pushed and the weight of the barges are taken into account by the captain in navigating the boat. In this regard, the record indicates that a captain can use his discretion to assign one or more lookouts. All crew members are trained to be lookouts. The captain can decide when to assign a look out, i.e. when visibility is one quarter of a mile, and where to post the lookout. The captain decides who he wants to use as a lookout, i.e., someone on watch already or someone who was not on watch, i.e., a deck hand on standby. The captain may also ask a deck hand to "ride a barge" if visibility is poor and he needs the lookout to see a dock. Further, according to employee Cutten, when he was a captain, he directed deckhands to take a pump out to a scow in tow and pump it out if it had water in it. This work would be assigned to the deck hand on watch or the deck hand on standby. In this regard, the record evidence indicates that the crewmembers know what they are supposed to do.
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> The Employer requires the captains (masters) to obey all Coast Guard Rules and Regulations. In this regard, there are Federal regulations with respect to the length of a tow hawser. The tow hawser is handled by the deck hands. If a hawser is incorrectly handled by the deck hands, the captain is subject to having his license suspended for violating regulations under U.S. code stipulations. Further, the captain is responsible to prevent the pollution of waters

[16] I previously articulated these factors in *Cook Inlet Tug & Barge, Inc*., 362 NLRB No. 111, slip op. at 5 fn. 9 (2015) (Member Miscimarra, dissenting), in which the Board majority held, over my dissent, that the employer's tugboat captains failed to qualify as statutory supervisors.

[17] Some further explanation regarding these three factors is set forth in Part E below.

[18] Regional Director's Decision and Order (D&O) at 4.

[19] D&O at 4.

[20] D&O at 6–7.

[21] D&O at 6–7.

and if a deck hand mishandles refuse, the captain can be penalized. The record does not specify how the captain is penalized and there is no probative evidence as to whether the Employer penalizes the captain in addition to the Coast Guard's action taken against the captain.

The captain is ultimately responsible for ensuring that the proper machinery and equipment is on the vessel. Based on a requirement for the captain/master to review certain types of systems on board the vessel to certify their condition prior to the vessel getting underway, the captain is responsible to fill out and sign pre-underway check sheets. The record indicates that the pre-underway check list is completed by both the captain and the engineer. The pre-underway checklist indicates that if any of the items checked are unsatisfactory, the captain should call the port engineer or the vessel compliance and safety manager prior to getting underway. According to Stephen Mitchell, Sustainability and Business Development Manager, the captain has the authority to refuse to sail if the vessel is not ready to proceed. In this regard, in mid February 2010, Stephen Mitchell, Sustainability and Business Development Manager observed Captain Rod Bissen exercise his authority to delay a vessel from sailing. More specifically, Captain Bissen asked the shipyard superintendent to raise the height of the tires that surround the perimeter of the boat, which delayed the tug by about three hours.

The captains "sign off on" or approve voyage plans and the captain's oil transfer authorization. If the captain delegates his authority to sign off on these forms, he remains responsible for everything that happens on the vessel as master of the vessel. The captain is required to make sure crew members receive an initial orientation when they come on board the vessel. The captain has the authority to deny access to a crew member if he does not possess proper documentation to board. The captain is a direct representative of the Employer aboard the vessel. The record indicates management and the captain are in communication while the vessel is at sea.

The Employer's Safety Management System Manual also provides that captains shall publish standard operating procedures, standing orders and night orders. Standing orders are instructions given to the crew by the captain which are to be followed unless instructed otherwise, i.e., an hourly check of the engine room, wear work vests, check on the captain or mate every hour, dinner is always at 6:00 p.m. Standing orders for mates could include a requirement to call the captain if there is poor visibility or inclement weather or an injury. Different captains may have different standing orders. Captains do not have to consult with management about their standing orders. Standard Operating Procedures are similar but are more of a procedure with steps to follow. The Employer provides captains with guidance in the preparation of their Standard Operating Procedures. In this regard, Grzybowski gives the captain a draft for their review, which the captain ultimately "takes ownership of." Night orders are usually instructions for the watch in the wheelhouse when the captain is asleep or otherwise not available, i.e., advise the captain if visibility is reduced and keep certain distance from other vessels.[22]

The record also establishes that other crew members do not sit on their hands when the Employer's tugboats are in operation. Rather, the mate, engineer and deckhands (and sometimes trainees) have their own responsibilities:

> The mate acts for the captain in his absence and is on watch when the captain is not on duty. The mate navigates the vessel, makes up the tow, and supervises personnel. The mate has some medical management duties that are independent of the duties that he shares with the captain. The engineer is responsible for the operation and maintenance of the propulsion plant making sure that the engines run, that they have electrical power, that the toilets flush and that they have running water. The engineer reports fuel levels to the captain. Deckhands are basically sailors who make up the tow lines, fish lines out of the water for moorings and attach them to barges, cook, clean and perform heavy lifting. Deck hands also keep a look out with either the captain or the mate, and inspect the deck during their watch. Trainees are individuals who are below skill level being trained to become deck hands. The positions of mate and captain require special licensing.[23]

My colleagues conclude that the captain is not a supervisor, even though the captain is the only person present with authority to address, in real time, all questions that arise regarding each of the above issues. I believe the facts, though simplified above, make it self-evident that these operations require a finding that someone—namely, the captain—possesses the authority to exercise

[22] D&O at 5–9.
[23] D&O at 4–5.

at least some of the functions specified in Section 2(11) and is a statutory supervisor. By finding that captains exercise none of the 2(11) supervisory functions, my colleagues effectively conclude that the Employer's vice president for Marine Transportation, Jerry Weldon, who is *not even present* on any of its tugboats, nonetheless discharges *all* 2(11) functions, even though it is the captain who directly oversees the mates, engineers, deckhands and trainees on the Employer's tugboats, 7 days per week, 24 hours per day. In my view, such a conclusion is irreconcilable with the record and contrary to the Board's own decisions in this area, as discussed more fully below.

B. For decades, the Board generally found tugboat captains to be supervisors, and the Board's recent decisions in this area deviate from that precedent.

Unsurprisingly, the Board has a long line of cases generally finding that tugboat captains are statutory supervisors,[24] and courts have uniformly enforced such findings.[25] In doing so, one court observed that it is "difficult to believe" that a tugboat would be "sent out for more than a week with no supervisors."[26] Although tugboats vary in size, the captains at issue in this case perform similar duties to tugboat captains in all cases: piloting the vessel, establishing standard operating procedures, and ensuring the safety of the boat, its crew, and its cargo.

The Second Circuit, in which this case arises, has harshly criticized the Board for finding that tugboat captains were not supervisors. In *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997), the court rejected the Board's finding that tugboat captains were not supervisors. In that case, as here, the tugboats at issue generally had six-person crews and towed or pushed barges up the Hudson River. Id. at 487. The Second Circuit found that the tugboat captains at issue "exercised authority to responsibly direct their crews." Id. at 490. Citing *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 361 (1st Cir. 1980) (internal quotations omitted), the court stated that direction is "responsible" when "the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." The court then enumerated several ways in which captains were held responsible for deckhands' performance, including that a captain may be subject to penalty if a deckhand disposes of waste improperly and may have his license suspended if a deckhand fails to properly handle a tow hauser. Id. at 490–491. The court stated that the Board's disregarding of evidence probative of supervisory authority "is another example of the practice followed all too often by the Board of rejecting evidence that does not support the Board's preferred result," id. at 490, adding that the Board was entitled to little deference when it comes to supervisory determinations because of its "biased mishandling of cases involving supervisors," id. at 492.

The majority's reasoning here represents an unfortunate extension of *Brusco Tug & Barge*[27] and *Cook Inlet Tug & Barge*,[28] divided Board decisions regarding Section 2(11) supervisor status in the context of tugboat operations. In *Brusco*, there was no challenge to the supervisory status of captains, but the majority (over Member Johnson's dissent) found that tugboat mates (the second-in-command) did not "assign" or "direct" engineers or deckhands, even though the tugboats operated around-the-clock during sea voyages that lasted up to 30 days, and the mates had sole responsibility for overall operation of the vessel for 12 hours out of every 24-hour period. Member Johnson dissented because, among other reasons, the "unavoidable result" of the majority's decision was that "in the swiftly changing, unpredictable, and potentially hazardous marine environment, there is no supervision for a good half of each 30-day sea voyage when the mates control the operation of the vessel and are vested with the authority of the captain."[29] In *Cook*

[24] See, e.g, *American River Transportation Co.*, 347 NLRB 925, 927 (2006); *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543 (2006); *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071–1072 (2002); *Alter Barge Line, Inc.*, 336 NLRB 1266, 1271 (2001); *Ingram Barge Co.*, 336 NLRB 1259, 1263 (2001); *Bernhardt Bros. Tugboat Service*, 142 NLRB 851, 854 (1963), enfd. 328 F.2d 757 (7th Cir. 1964). On rare occasions, the Board has found tugboat captains not to be supervisors. See, e.g., *Trident Seafoods*, 318 NLRB 738, 739 (1995); *McAllister Bros.*, 278 NLRB 601, 614 (1986), enfd. 819 F.2d 439 (4th Cir. 1987). (In *McAllister Bros.*, the respondents did not pursue their contention that captains were supervisors before the court of appeals, so the court did not address the issue.) However, in *Trident Seafoods*, the employer simply failed to introduce any evidence in support of its position on the 2(11) issue. And in *McAllister Bros.* the Board found that tugboat captains did not exercise independent judgment in directing crewmembers because their authority was based on their greater technical expertise and experience. 278 NLRB at 614. As the Board subsequently recognized in *American Commercial Barge Line*, the Supreme Court rejected this rationale in *Kentucky River Community Care*. See 337 NLRB at 1071–1072. Accordingly, *McAllister Bros.* has been effectively overruled.

[25] See, e.g., *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1 (3d Cir. 1969); *Local 28, International Organization of Masters, Mates and Pilots v. NLRB*, 321 F.2d 376, 377 (D.C. Cir. 1963); *Bernhardt Bros.*, above.

[26] *Mon River Towing*, 421 F.2d at 5 fn. 13.

[27] 362 NLRB No. 28 (2015) (*Brusco II*). In *Brusco II*, a Board panel in part redecided a prior Board panel decision reported at 359 NLRB No. 43 (2012) (*Brusco I*) in the wake of *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[28] 362 NLRB No. 111 (2015).

[29] *Brusco II*, 362 NLRB No. 28, slip op. at 2 (Member Johnson, dissenting). Like Member Johnson in *Brusco II*, Member Hayes for simi-

Inlet, the majority (over my dissent) found that tugboat captains did not "assign" or "direct" deckhands even though uncontroverted evidence established that captains determined deckhands' hours, had authority to reassign deckhands from one vessel to another, and directed deckhands to perform a multitude of tasks.[30] I dissented from the finding of nonsupervisory status because, among other things, it was untenable for reasons that have equal application in this case:

> [A] finding against supervisory status fails to give appropriate consideration to the nature of the operations here. The Employer's tugboats are used for . . . work that frequently involves hazardous conditions and substantial variation from job to job. My colleagues' finding produces an outcome in which *nobody* on the Employer's vessels exercises supervisory authority, contrary to the record evidence and applicable Coast Guard requirements that make captains ultimately accountable for everything that happens on board.[31]

C. Oakwood Healthcare did not change Section 2(11) nor did it overrule all prior Board precedents regarding supervisor status.

To establish that the captains are supervisors, the Employer must show by a preponderance of evidence that (1) captains hold the authority to engage in any one of the supervisory functions, (2) their exercise of such authority is not routine or clerical, but requires independent judgment, and (3) their authority is held in the interest of the employer. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To show that the captains responsibly direct other crewmembers, the Employer must show that captains are "held fully accountable and responsible for the performance and work product of the employees [they] direct[]." Id. at 691 (internal quotations omitted). This standard should sound familiar: it is exactly the same standard the court applied in *Spentonbush*, above. Indeed, the Board in *Oakwood* explicitly adopted the definition of accountability that certain courts of appeals had adopted, and cited the same language from the same case (among others) that the *Spentonbush* court had cited.[32]

Moreover, in *Oakwood*, the Board explicitly cited a previous tugboat case, *American Commercial Barge Line Co.*, 337 NLRB at 1071, for the proposition that the term "responsibly to direct" includes an accountability element.[33] In *American Commercial Barge Line*, the Board found that tugboat pilots, a position subordinate to the captain, responsibly directed crew and were therefore supervisors. The Board found that "[i]f a crew member does something wrong during the pilot's watch, such as causing the tow to break loose, the pilot is held responsible. The consequences of an error in the pilot's judgment can be catastrophic, including a collision causing loss of life or a chemical spill." 337 NLRB at 1071. The Board also recognized that *McAllister Bros.*, above, had been effectively overruled by the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, above.[34] The Board in *Oakwood* would not have cited *American Commercial Barge Line* favorably had it wished to deprive that case of its precedential value.

There is no sound basis for my colleagues' broad assertion that all pre-*Oakwood* precedent regarding supervisory status is "of limited precedential value." As discussed below, they dismiss ample evidence of accountability and find that captains with the same duties as the captains found accountable in *Spentonbush* and *American Commercial Barge Line* are not supervisors. I cannot join in finding that *Oakwood* mandates such a wholesale departure from the Board's longstanding precedent when the *Oakwood* Board explicitly endorsed part of that precedent speaking directly to the issue in this case.

D. The record demonstrates that captains responsibly direct and assign crewmembers.

Captains are the highest-ranking individuals responsible for operating tugboats that have a 6-employee crew. As the Third Circuit observed in *Mon River Towing*, if the captains were not supervisors, the majority of the Employer's operations would be conducted for a week at a time without any supervisor on board.[35] Such a proposition is clearly implausible given the nature of this work.

Although the Regional Director, like my colleagues, concluded that the captains here did not "direct" mates, engineers, deckhands or trainees, such a conclusion cannot be squared with the Regional Director's own description of the Employer's operations and the duties of captains (quoted at length in Part A, above). In all material respects, the instant case is the same as *Spentonbush* and *American Commercial Barge Line*.[36] The tugboats here

lar reasons dissented in *Brusco I*, 359 NLRB No. 43, slip op. at 10–13 (Member Hayes, dissenting).

[30] *Cook Inlet*, 362 NLRB No. 111, slip op. at 4 fns. 6, 7 (Member Miscimarra, dissenting).

[31] Id., slip op. at 5 (footnotes omitted; emphasis in original).

[32] *Oakwood*, 348 NLRB at 691 fn. 30 (citing *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d at 361).

[33] See *Oakwood*, 348 NLRB at 692 fn. 37.

[34] See fn. 23, above.

[35] 421 F.2d at 5 fn. 13.

[36] My colleagues state that *Spentonbush* is of limited precedential value because "questions of supervisory status under Section 2(11) of the Act 'cannot be answered merely by the assertion of maritime law,'" quoting *Brusco I*, above, 359 NLRB No. 43, slip op. at 8, incorporated by reference in *Brusco II*, above, 362 NLRB No. 28. However, *Brusco*

have crews of six employees, all of whom answer to the captain. The Employer's Safety Management System and the Coast Guard regulations cited in *Spentonbush* make clear that the captain is responsible for everything that happens aboard the tugboat.[37] Should the captain fail to ensure that a deckhand properly ties a tow hauser or properly disposes of waste, the captain could face penalties or even lose his license to operate the vessel. My colleagues state that there is an "absence of specific evidence showing that *the Employer* holds its captains accountable for a deckhand's failure to follow that law" (their emphasis). But the record reveals that the Employer requires all captains to maintain their licenses. There is little question that the Employer would remove a captain who lost his license due to a deckhand's failure to follow Coast Guard regulations.

The record also reveals that captains participate in an incentive bonus program. Under that program, captains receive bonuses if they make trips quickly. Of course, other crewmembers' performance factors into how quickly a tugboat can make a trip. For instance, captains issue standing orders instructing mates when to leave port in inclement weather. Should a mate fail to timely leave port, a captain could lose a bonus payment. Moreover, every captain to testify clearly stated that he was responsible for everything that happens on the boat. My colleagues dismiss this uncontroverted testimony as insufficiently specific. As I have observed in the past, however, the Board should not disregard unrebutted evidence "merely because it could have been stronger, more detailed, or supported by more specific examples."[38] To do so runs dangerously close to "rejecting evidence that does not support the Board's preferred result," as the court accused the Board of doing in *Spentonbush*.[39]

Unlike my colleagues, I would further find that captains assign deckhands.[40] Assigning is the act of designating an employee to a place, such as a location, department, or wing, appointing an employee to a time, such as a shift or an overtime period, or giving significant overall duties to an employee. *Oakwood Healthcare*, 348 NLRB at 689. Uncontroverted testimony establishes that captains can assign a deckhand to a place by asking a deckhand to ride a barge if the captain believes that doing so would improve visibility. Captains can also assign a deckhand to pump out a barge if, in the captain's discretion, the barge has taken on sufficient water to warrant that assignment. As in *American Commercial Barge Line*, captains can require the deckhand on standby to report to duty, essentially appointing that deckhand to a shift. Captains do not check with anyone before doing so.

The record also contains evidence, improperly discounted by the Regional Director, that captains exercise other supervisory functions. For instance, Tug Personnel Manager Robert Haab testified that he tells captains they have the authority to fire other crewmembers. Captain Joseph LoPiccolo testified that he once fired an employee for insubordination. The record also reveals that captains resolve any disagreements between deckhands over the shift schedule, which is an example of adjusting grievances. I believe these examples, along with the evidence relating to captains' authority to assign and responsibly direct crewmembers, highlight the risk of scrutinizing Section 2(11) factors individually, while ignoring Congress's mandate to apply supervisory status to a broad range of employees. Each Section 2(11) indicium does not exist in a vacuum; if a supervisor has the power to fire employees, that necessarily affects the weight the Board should give to evidence of the supervisor's power to assign or responsibly direct them. When viewing the 2(11) indicia separately, it is easy to dismiss the above examples as isolated instances that do not show that captains generally wield the power to fire or assign employees. But when viewed as a whole and together with the evidence of direction, these examples add up to show that captains wield broad power over the

Tug addressed the supervisory status of *mates*, and the Board in *Brusco I* distinguished *Spentonbush* on the ground that *Spentonbush* dealt with the supervisory status of captains. 359 NLRB No. 43, slip op. at 8. By distinguishing *Spentonbush* rather than disagreeing with it, the Board in *Brusco I* implicitly recognized that *Spentonbush* was embraced by the Board in *Oakwood Healthcare* when the Board there adopted the definition of accountability the Second Circuit relied on in *Spentonbush*. Under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the Board must provide a reasoned explanation for any departure from precedent, and my colleagues have not sufficiently explained their departure from *Spentonbush* and *American Commercial Barge Line*. My colleagues reply that there is no departure from precedent to be explained. I believe there is, and that the Board should provide a reasoned explanation when departing from circuit court precedent applying *the same standard* for accountability that the Board has since adopted.

[37] The Regional Director found that this evidence was "paper authority" and did not rely on it. As I have stated in the past, I do not think the Board should ignore uncontroverted evidence simply by labeling it "paper authority." *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 27 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[38] *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 3; see also *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 27.

[39] 106 F.3d at 490.

[40] Although, in its Request for Review, the Employer does not specifically contend that captains assign work to other crewmembers, it contends that the Regional Director erred by failing to follow precedent, such as *American River Transportation Co.*, above, finding that captains or subordinate officers both assign and responsibly direct work. Because I agree that the Regional Director should have followed Board precedent finding that officers with very similar duties to the captains here had the power to assign, I address the issue here.

terms and conditions of other crewmembers' employment.

The record contains sufficient evidence that captains responsibly direct and assign crewmembers. To hold otherwise ignores both the record evidence and our longtime precedent dealing with tugboat captains. Moreover, my colleagues' holding fails to recognize the industrial realities of the tugboat workplace, in which the captain is the ultimately responsible person present during hazardous operations that take place 24 hours per day up to 7 days at a time. In addition, I believe my colleagues improperly disregard uncontroverted evidence of supervisory authority "merely because it could have been stronger, more detailed, or supported by more specific examples."[41]

E. The Board must always consider three factors when determining supervisory status under Section 2(11).

More generally, my colleagues disregard three factors that are especially important here. As noted previously,[42] I believe these three factors should be considered by the Board in every case involving disputed supervisory status: (i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.

My colleagues mischaracterize these factors as "a new test for supervisory status." Contrary to my colleagues' portrayal, these factors are nothing new,[43] and they are consistent with Section 2(11). Indeed, it is difficult to see how a realistic evaluation of supervisory status can be made without them. It breaks no new ground to state, when deciding whether someone is a supervisor, that the Board must consider "the nature of the employer's operations." The Board must obviously also consider "the work performed by undisputed statutory employees"—i.e., the people who require supervision by someone. Finally, the Board must consider "whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute." In plain English, this final factor essentially asks, "If one accepts the Board's finding that the disputed employees are *not* supervisors, does that produce a ludicrous or illogical result—for example, one where *nobody* has the authority to hire, discharge, discipline, assign, or responsibly direct employees (or to exercise any of the other indicia of supervisory authority set forth in Section 2(11))?" In short, these three factors do not comprise "a new test for supervisory status," but a guide to how the Board should *apply* the indicia of supervisory status that Congress listed in Section 2(11). They are meant to help the Board avoid conclusions regarding supervisory status that fail the test of common sense—which, unfortunately, the majority's conclusion in this case does.

I believe any reasonable evaluation of the record in this case in light of these factors warrants a finding that the Employer's tugboat captains possess supervisory authority under Section 2(11) of the Act. Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 2, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[41] *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 3 (Member Miscimarra, dissenting).

[42] See text accompanying fns. **Error! Bookmark not defined.**16 and **Error! Bookmark not defined.**17, supra.

[43] Again, I previously articulated the same three factors and applied them in *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 5 fn. 9 (Member Miscimarra, dissenting).